STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of In the Matter of ADDISON LYNN-MARIE WADDELL and HARLAND THOMAS-LOGAN SMITH, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

WILLIAM WADDELL,

Respondent-Appellant,

and

KATHRYN DEMARCO,

Respondent.

UNPUBLISHED
August 4, 2009

No. 288681
Ingham Circuit Court
Family Division
LC Nos. 08-000765-NA
08-000818-NA

In the Matter of ARIANA LEIGH DEMARCO, JOSEPH VICTOR DEMARCO, ADDISON LYNN-MARIE WADDELL, and HARLAND THOMAS-LOGAN SMITH, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KATHRYN DEMARCO,

No. 288682
Ingham Circuit Court
Family Division
LC Nos. 08-000763-NA
08-000764-NA
08-000765-NA
08-000818-NA

Respondent-Appellant,

and

WILLIAM WADDELL,

Respondent.

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

In these consolidated appeals, respondent father appeals as of right the termination of his parental rights to the minor children Addison and Harland under MCL 712A.19b(3)(b)(iii), (g), (j), and (k)(ii), and respondent mother appeals as of right the termination of her parental rights to all four minor children under MCL 712A.19b(3)(g) and (j). We affirm.

The trial court did not clearly err in finding that the statutory grounds for termination of respondents' parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Respondents argue that the evidence was not sufficient to terminate their parental rights at the initial disposition, particularly in light of the progress respondent mother was making in counseling and petitioner's failure to offer respondent father services.

Testimony by respondent mother's therapist showed her judgment and ability to protect her children was significantly impaired by the abuse she had suffered as a child and during her prior relationships, and that she had a desperate psychological need to create the ideal, stable, two-parent family she had not enjoyed as a child. She allowed respondent father to move into her home with her two young children from a prior relationship on his first visit to Michigan in May 2006, despite a background check that revealed he had a criminal record. She subsequently had two more children during their relationship, the second after this proceeding commenced.

On two occasions in 2007, respondent mother's daughter disclosed inappropriate touching by respondent father, but respondent mother did not take action because she felt the touching may have been accidental and that the child may have possessed histrionic tendencies like her biological father. On March 21, 2008, the child disclosed to respondent mother that respondent father partially penetrated her. Although respondent mother believed the child, she took no action to put respondent father out of her home or report the abuse because she did not want to confront respondent father, and she left the child with the responsibility of reporting the abuse to a third party. Respondent mother stated to an investigator that she continued to allow respondent father to care for the children after the disclosure, but she later testified at the termination hearing that she did not do so.

Respondent father was arrested for a probation violation by federal marshals on April 1, 2008, extradited to Pennsylvania, and incarcerated. Even then, respondent mother did not report the abuse to authorities, but the child disclosed it to a police officer at school on April 4, 2008, the children were removed, and these proceedings commenced. During the approximately ten

days respondent father was lodged in the Ingham County Jail awaiting extradition, respondent mother maintained telephone contact with him and visited him instead of accompanying the child to her forensic interview, and she placed money in his jail account. She maintained communication partly in cooperation with the investigator to convince respondent father to submit to a polygraph but also testified she did so because he would not quit badgering her. The maternal grandmother finally took steps to cut off respondent father's telephone contact.

The child in question testified at the termination hearing. The trial court found her allegations of abuse credible and found that respondent father had sexually abused her and that respondent mother had failed to protect her. In addition, evidence was adduced that respondent father was domestically violent toward respondent mother, as well as physically abusive to two of the children, and that the children were afraid of him. Under the doctrine of anticipatory neglect, how respondents treated one child is indicative of how they might treat the other children. *In re Powers*, 208 Mich App 582, 588-589; 528 NW2d 799 (1995). Therefore, the trial court had clear and convincing evidence that respondents failed to provide proper care or custody for all of the children. Respondent father admitted no wrongdoing and did not show he engaged in rehabilitative services in prison. Therefore, the trial court correctly found no reasonable likelihood he would be able to provide proper care or custody within a reasonable time.

Respondent mother's challenge was to become able to consistently place the children's needs before her own within a reasonable time. The trial court could not know with certainty whether respondent mother would expose the children to future unhealthy relationships and danger, but the evidence clearly showed respondent mother had done so for nearly the children's entire lifetimes by: (1) returning to her unstable and alcoholic ex-husband in 2004 after divorcing him, despite engaging in counseling with the same therapist; (2) making the poor decision to allow respondent father, who was a virtual stranger with a criminal record, entry into her home and access to her children; (3) leaving one of her children to fend for herself during a year of sexual abuse and even after disclosure of penetration; (4) failing to report the abuse even after respondent father was arrested; (5) visiting respondent father in jail and giving him money instead of accompanying the child in question to her forensic interview; and (6) allowing the father who had emotionally harmed her as a child to move into her home during these proceedings to assist her with expenses. The evidence showed that respondent mother had deep-seated personality characteristics that caused her to place her wants before the needs of the children, and that even with domestic violence, individual, and family counseling, her prognosis would be guarded. Whether respondent father would be convicted for the abuse and how long he would remain incarcerated was uncertain, but the evidence showed even though respondent mother ceased contact with him, he did not cease contact with her. Respondent mother would struggle to maintain her own psychological health, and the record does not create a firm and definite conviction that the trial court erred in finding that respondent mother would not be able to significantly change her personality and provide the care the children needed within a reasonable time.[1]

[1] We note that only one statutory ground need be proven to justify the termination of parental rights. *In re Trejo*, 462 Mich 341, 352; 612 NW2d 407 (2000).

Respondent father asserts on appeal that, in the absence of reunification services, the evidence was insufficient to terminate his parental rights. The Michigan Legislature mandated in MCL 722.638(1)(a)(ii) and (2) that petitioner request termination of parental rights at the initial disposition when a parent is the suspected perpetrator of sexual abuse on a child or her sibling or when a parent fails to take reasonable steps to intervene to eliminate that risk. Therefore, petitioner did not provide respondents reunification services other than to refer respondent mother for a psychological evaluation and parenting classes and to supervise her visits with the children. This limited provision of services to respondent mother and absence of provision of services to respondent father was appropriate, given that petitioner is not required to provide any services when termination of parental rights is the agency goal, *In re Terry*, 240 Mich App 14, 26 n 4; 610 NW2d 563 (2000), and the legislative mandate justified that decision. In addition, provision of services presumes some participation by a respondent. Respondent father was incarcerated in Pennsylvania. Respondent father provided no evidence indicating he voluntarily engaged in prison services such as counseling, parenting classes, or sexual offender therapy.

Respondents next argue that the trial court did not make adequate best interests findings, and that the evidence did not show that termination of their parental rights was clearly in the best interests of the children. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Findings of fact are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. See *People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989). In its oral opinion, the trial court stated facts supporting its decision to terminate respondents' parental rights under their respective statutory grounds. It recited the proper best interests standard, and without making additional findings of fact found termination in the children's best interests. The trial court's best interests determination should be based on evidence derived from the entire record, *Trejo*, *supra* at 353-356, and in this case it was evident that the trial court was aware of the issue and the proper standard and made one recitation of facts outlining sufficient evidence to support its decision concerning both the statutory grounds for termination and the children's best interests. The trial court made adequate best interests findings.

The evidence was sufficient to show termination was in the children's best interests. One child was removed at birth and not bonded to either respondent. Respondent father sexually abused another child and was physically violent toward respondent mother and the children. Given the legal presumption of anticipatory neglect, the trial court did not clearly err in finding termination of his parental rights in the children's best interests.

In light of respondent mother's long history of placing her needs before the children's, her alignment with respondent father for a period of time even after the children were removed, the significant change respondent mother was required to make in her very personality in order to parent the children safely and in a manner protecting their emotional well-being, and the length of time required before even a guarded reunification could be attempted, the trial court did not clearly err in finding termination of respondent mother's parental rights in the children's best interests.

Next, respondent father argues that an error requiring reversal occurred because he was not physically present at the termination hearing. Respondent has waived this issue through inadequate briefing. See *People v Martin*, 271 Mich App 289, 315; 721 NW2d 815 (2006). At any rate, we note that while a respondent has the right to be present at a dispositional hearing,

either in person or through counsel, the trial court may proceed in his absence if he was provided proper notice of the proceeding. MCR 3.973(D)(2) and (3). Respondent does not assert lack of proper notice. The trial court is not required to secure a respondent's presence. *In re Vasquez,* 199 Mich App 44, 48-49; 501 NW2d 231 (1993). In this case, respondent father's choice to violate probation caused his incarceration in Pennsylvania and inability to be physically present. In a child protective proceeding, the trial court should grant an adjournment only for good cause and after considering the children's best interests. MCR 3.923(G). Given that respondent requested a five-month adjournment until he was extradited back to Michigan, his physical presence was impracticable because he was incarcerated in Pennsylvania, and he was represented by counsel and present by speakerphone on all three dates of the termination hearing, we conclude that the trial court did not violate respondent father's procedural due process right by denying his request to adjourn the termination hearing until he could be physically present. The evidence also did not show that respondent father was deprived of the opportunity to confer with counsel or to adequately prepare for the hearing. The trial court record showed counsel was able to communicate with respondent father by telephone and very ably represented him. Respondent father does not specify what additional preparation or participation would have been effected had he been present in person or how it would have resulted in a different outcome in his case.

Extensive discussion of the fact that the Sixth Amendment right to confrontation and cross-examination does not always apply in child protective proceedings, *In re Brock*, 442 Mich 101, 109-110; 499 NW2d 752 (1993), is not required because respondent father was provided his right. In fact, respondent father initially stipulated to the abuse allegations against him being presented through a detective in order to spare the child the trauma of testifying, and he may not assert a contrary position on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005) ("[a] litigant may not harbor error, to which he or she consented, as an appellate parachute"). The child did testify and respondent father, present by speakerphone and represented in person by counsel, fully exercised the opportunity to confront her through cross-examination on the allegations she made against him.

Lastly, respondent mother asserts that her counsel's act of waiving a jury trial and advising her to make admissions without bargaining for petitioner's withdrawal of its request for immediate termination severely limited her options, placed petitioner in a position of strength, and was so clearly detrimental on its face that it constituted ineffective assistance of counsel. Respondent mother raises the issue of ineffective assistance of counsel for the first time on appeal. A claim of ineffective assistance of counsel should be raised by moving for a new trial or an evidentiary hearing, but it may be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in the record to permit this Court to decide the issue. *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984). In the absence of an evidentiary hearing in the trial court, review on appeal is limited to mistakes apparent on the trial court record. *People v Rodriquez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel usually presents mixed questions of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

The right to effective assistance of counsel is explicitly guaranteed in criminal cases, and the principles surrounding it developed in the context of criminal law apply by analogy in child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002).

To establish a claim of ineffective assistance of counsel, respondent is required to show: (1) that her attorney's performance was prejudicially deficient and (2) that under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. See *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). In showing that counsel's representation was deficient, respondent must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). It is a general rule that this Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy. *Cicotte*, *supra* at 636-637. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, *supra* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

The decision to waive a jury trial was a matter of trial strategy. The standard of proof required for assumption of jurisdiction is the relatively low standard of a preponderance of evidence. MCR 3.972(C)(1). By the time of the adjudication trial, the abused child had already made statements alleging abuse to a police officer, a detective, and in her forensic interview, and respondent mother had admitted to a detective and a protective services investigator that the child told her about the abuse three times but that she did not believe it, and she continued to allow respondent father to care for the children after the March 2008 incident. Clearly, this evidence constituted a preponderance of evidence sufficient to assume jurisdiction over the children whether presented to a judge or jury. Waiving a jury trial was not error and did not undermine a different outcome.

The decision to make admissions was also a matter of trial strategy. Respondent mother argues that counsel's advice to admit allegations he drafted into the petition without bargaining for petitioner's removal of its request for immediate termination was clearly detrimental. However, the trial court record showed that there was no possibility of such a bargain with petitioner. Petitioner steadfastly refused to withdraw its request for termination. The trial court record showed that respondent mother's admission to the fewer and less damaging allegations her counsel had drafted instead of the facts alleged by petitioner constituted the best plea bargain agreement available to her. Counsel's advice to make admissions granting the trial court jurisdiction was not error and did not prejudice respondent mother. With or without respondent mother's admissions, sufficient evidence existed to establish jurisdiction by a preponderance of evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering